No. 77-1261

In the Supreme Court of the United States

OCTOBER TERM, 1977

JUNE MYSLAJEK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
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Petitioners contend that the court of appeals erred in enforcing two internal revenue summonses requiring petitioner June Myslajek, an accountant, to produce records of two of her clients, petitioners Irwin L. Pollack and I. L. Pollack & Associates, Inc.

On April 17, 1975, Revenue Agent Mark Cohen began an audit of the 1973 tax return of I. L. Pollack & Associates, Inc. He later expanded his audit to cover the years 1972, 1974 and 1975, and to include petitioner Irwin L. Pollack. Although Agent Cohen received some documents in the course of his examination, he subsequently returned them to petitioner Myslajek to enable her to comply with subpoenas in a divorce proceeding to which petitioner Pollack was a party. During the audit, Agent Cohen found certain indications of fraud and

referred the case to the Internal Revenue Service's Intelligence Division, where it was assigned to Special Agent Robert J. Pyle. On August 24, 1976, Agent Pyle issued two summonses to petitioner Myslajek, requiring her to produce specified documents in her custody. The summonses were left at her office with her adult son. Petitioner Myslajek appeared in response to the summonses, but she refused to produce the requested documents (Pet. App. 4). The government thereupon instituted this enforcement action.

The district court ordered enforcement of the summonses. The court found that the investigation had a valid civil tax purpose (Pet. App. 12), that even though Agent Cohen previously had seen some of the records, none of the records sought by the summonses were currently within the possession of the Internal Revenue Service (*id.* at 12-13), and that since the initial tax investigation had not been completed, a second inspection notice was not required by Section 7605(b) of the Internal Revenue Code of 1954, 26 U.S.C. 7605(b) (Pet. App. 13). The court of appeals affirmed *per curiam* (*id.* at 3-9).[1]

1. Petitioners argue (Pet. 6-10) that the decision of the court of appeals conflicts with *United States* v. *LaSalle National Bank*, 554 F. 2d 302 (C.A. 7), certiorari granted, No. 77-365, December 12, 1977. *LaSalle*, however, involved a refusal to enforce internal revenue summonses, even though they had been issued prior to a recommendation for prosecution, on the ground that the special agent's investigation was "solely for the purpose of unearthing evidence of criminal conduct * * *" (554 F. 2d at 305). While we have argued in *LaSalle* that the Seventh

[1]Mr. Justice Blackmun stayed the judgment of the court of appeals on February 1, 1978, pending this Court's disposition of the petition.

Circuit's characterization of that investigation as "solely for criminal purposes" misperceives the function of an Internal Revenue Service tax investigation and that its denial of enforcement is contrary to the standard announced by this Court in *Donaldson* v. *United States*, 400 U.S. 517, the conflict between *LaSalle* and *Donaldson* has no bearing on this case. Here, the district court specifically found that "the IRS also has a valid civil tax purpose for the investigation—determining the correct and as yet undetermined civil tax liabilities of Pollack and of Associates" (Pet. App. 12). Thus, the summonses to petitioner Myslajek would be enforced under the restrictive *LaSalle* test, as well as under any other court's interpretation of the *Donaldson* standard. Compare *United States* v. *Morgan Guaranty Trust Co.*, C.A. 2, No. 77-6191, decided February 6, 1978.

2. Relying on the fact that Revenue Agent Cohen had previously examined some of their records, petitioners contend (Pet. 11-12) that the court of appeals erred in enforcing the summonses because the information sought was already within the possession of the Internal Revenue Service. This Court, however, implicitly has rejected the identical argument in *United States* v. *Powell*, 379 U.S. 48. There, the officer of a corporation under investigation opposed the enforcement of a summons on the ground that the Internal Revenue Service had once examined the records in question and that the limitation on "unnecessary examination or investigations" in Section 7605(b) required the Commissioner to establish probable cause for suspecting fraud. Although the Court observed that, in order to obtain enforcement of a summons, the Commissioner "must show * * * that the information sought is not already within the Commissioner's possession * * *" (379 U.S. at 57-58), it nonetheless reversed

the judgment of the court of appeals prohibiting enforcement of the summons. Here, too, as the district court correctly noted (Pet. App. 12-13), simply because "agent Cohen saw some of the financial records on a prior occasion does not mean that the information contained therein is currently within his possession or that of the IRS."[2]

Similarly unmeritorious is petitioners' contention (Pet. 13-16) that the summonses are unenforceable because the Internal Revenue Service failed to issue a "second inspection" notice pursuant to Section 7605(b). That section requires a second inspection notice only where there has been a meaningful examination and resolution of a taxpayer's liability and, thereafter, the Internal Revenue Service seeks to reopen the examination and to reinspect the same records. See, *e.g.*, *United States* v. *Kendrick*, 518 F. 2d 842 (C.A. 7), certiorari denied, 423 U.S. 1016; *United States* v. *Schwartz*, 469 F. 2d 977, 983 (C.A. 5); *United States* v. *Giordano*, 419 F. 2d 564, 567 (C.A. 8), certiorari denied, 397 U.S. 1037; *Hinchcliff* v. *Clarke*, 371 F. 2d 697 (C.A. 6), certiorari denied, 387 U.S. 941. After an evidentiary hearing, the district court concluded that "the IRS's investigation of the tax liabilities of Pollack and of Associates * * * [was] a continuing one" and, therefore, that the second inspection

[2] *United States* v. *Pritchard*, 438 F. 2d 969 (C.A. 5), upon which petitioners rely (Pet. 11-12), is not to the contrary. There, it was undisputed that prior to the service of the summons the revenue agent had looked at all of the copies of the taxpayer's papers in the accountant's file. However, "[n]either the Government's petition [for enforcement] nor the agent's affidavit made reference to whether the information sought was in the Commissioner's possession" (438 F. 2d at 971). In those circumstances, the court concluded that the information was in the Commissioner's possession. Here, on the other hand, the district court was "convinced that the information which the IRS seeks to glean from the financial records which it has summoned is not information which is currently in the IRS's possession" (Pet. App. 13).

requirement of Section 7605(b) was inapplicable (Pet. App. 13). The court of appeals upheld this factual finding as supported by the evidence (*id.* at 8), and there is no need for further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

3. Finally, petitioners claim (Pet. 16-20) that the summonses should not be enforced because they were not served upon petitioner Myslajek personally or left at her "last and usual place of abode" (see Section 7603) but rather were served upon her adult son at her business office. Petitioner Myslajek, however, has never claimed that she was unaware of the summonses or their contents or that she was otherwise prejudiced by the form of service. As the court of appeals noted (Pet. App. 5-6), she appeared before the agent at the specified time without objecting to the method of service. In these circumstances, the court below correctly concluded that petitioner Myslajek waived any defect there may have been in service of the summonses. See *United States* v. *Gajewski*, 419 F. 2d 1088 (C.A. 8), certiorari denied, 397 U.S. 1040; *United States* v. *Ponder*, 475 F. 2d 37, 38-39 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

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